UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CADILLAC OF NAPERVILLE

and

Cases 13-CA-207245

AUTOMOBILE MECHANICS LOCAL 701,
INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS
AFL-CIO

RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO EXCEPTIONS

Respectfully submitted:

By:/s/ Michael P. HacHarg
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Respondent timely filed Exceptions and a Supporting Brief in the above-captioned matter, and Counsel for the General Counsel timely filed her Answering Brief on September 14, 2018. Respondent respectfully submits the following Reply in compliance with Section 102.46 of the Board's Rules and Regulations

I. PROCEDURAL EXCEPTIONS

A. Witness Statements

Respondent excepted to the ALJ's requirement that each of the testifying witness statements was required to be returned to Counsel for the General Counsel at the conclusion of each witness's testimony.[1] This ruling is in direct conflict with the mandate of *Wal-Mart*, 339 NLRB 64 (2003)

The gravamen of Counsel for the General Counsel's argument is that Respondent was entitled, at least in theory, to review a witness statement again in the event such witness was recalled. This argument misses the point entirely. A trial is an exercise in preparation, strategy and execution. The idea that Respondent's counsel is properly afforded the time to prepare strategy on the off chance that a witness is recalled opening the door to further recall of a witness statement is ludicrous. As previously noted, Counsel for the General Counsel has been in possession of relevant witness statements for months, possibly even years. Respondent's counsel is then afforded ten to fifteen minutes to review witness statements up to twenty pages, proceed to cross-examination and return the statements never to be reviewed again.

The *Wal Mart* decision resoundingly resolved this conundrum. Curiously, Counsel for the General Counsel states that the Board never ruled whether counsel may review an affidavit for a full length of the hearing. The words of the case are precisely in opposition to this view,

[1] In her Answering Brief, Counsel for the General Counsel focuses solely on a single witness, Sam Cicinelli, the Charging Party's business representative.

"counsel may retain the copy throughout the hearing..." 339 NLRB at 65, fn.3. The utter dishonesty in disregarding this language is galling.

In an effort to punt the issue from the forefront, Counsel for the General Counsel argues that Respondent does not demonstrate specific prejudice. This amorphous beast needlessly undermines the bright line *Wal Mart* rule, articulated in 2003. The specific prejudice is that counsel is afforded inadequate preparation time to review the witness statement in a full setting, without the immediate pressure to conduct a crucial cross-examination. It is nigh on impossible to cite specific examples where questioning could have been more focused or thorough, because the statements are gone. Quite simply, there is no substitute for proper preparation. In a case such as this where credibility resolutions were made on super particularized reasoning with regard to dates and details, it should be self-evident that permitting a "deep dive" into a witnesses statement properly affords a party the fullest opportunity to craft precise examination. The prejudice lies in the inherent unfairness of a process that presumes 15 minutes is adequate to review testimonial notes, review a witness statement *for the first time*, present an examination and then return the statement.

The Wal Mart ruling is neither controversial nor burdensome on the General Counsel. It affords fundamental trial fairness. Any effort to depart from it is self-serving.

B. <u>Tape Recordings</u>

Next, Counsel for the General Counsel argues in support of admission of an unlawful tape recording. 720 ILCS 5/14(d). Quite simply, that statute requires consent of ALL parties to a conversation to consent to its recording. The Illinois legislature passed this law in immediate response to an Illinois Supreme Court case invalidating a prior statute. Obviously, Illinois has a strongly vested interest in dual party consent to recording. This is evidenced by the fact that disregard of this statute is a **criminal** matter.

Admittedly, the Board has been cavalier with regard to ignoring these types of state statutes. It should no do so. Board law is flexible enough to adapt to some state laws - Right to Work - being the most glaring example. Illinois has elected to protect its citizenry from surreptitious tape recording through a long held dual party consent law. There is no justification for the Board to depart from the mandates of state legislatures, so long as those laws do not conflict with the NLRA. A dual party consent law does not infringe on the NLRA nor undermine the Board's mission. Accordingly, the state law should receive appropriate deference and the unlawful recording suppressed.[2]

II. 8(A)(1)

Next, Counsel for the General Counsel turns her attention to the legal deficits supporting certain 8(a)(1) findings. She quite correctly notes that precise credibility resolutions play a key role in determining this case, precisely the subject of the arguments in **I(A)**, *supra*. However, she then argues that challenging some of these rulings on the law is somehow a "backdoor" assault on the ALJ's rulings. (Answering Brief, p.6)

Counsel for the General Counsel attempts to buttress the crucial incorrect finding that a June 29 conversation encompassed a strike with irrelevancies like: the testimony was not the result of leading questions. Nobody ever said it was. The process does not permit the creation of factual records through improper questions.

This improper ruling is the crack in the foundation of the entire case. Each of these dubious stand-alone statements, when credited, suddenly become a "pattern." Yet, if you remove the tautology, then no pattern can emerge or be discerned. The law does not recognize an isolated statement - if there is a strike, things will not be the same, as being unlawful. The

[2] Obviously, a potential downside here would be the reporting of this behavior to authorities for prosecution. Such a tif-for-tat escalation is precisely the behavior Illinois seeks to avoid in an effort to maintain the peace.

consideration that this is somehow unlawful is dependent on reliance on numerous outside factors, not the least of which is the colorful manner that Laskaris often speaks.

Next, Counsel for the General Counsel supports the finding of a threat on September 20 with the argument that Laskaris did not speak to Towe in "response to Towe's alleged misconduct on the strike line. (Answering Brief p.7) This is unreasonable. Laskaris and Towe were discussing a video wherein Towe obstructed a customer. If any discussion pendant to this observation in not in "response" to misconduct, then responsive discussion has lost all meaning. Plainly, this discussion lasted seconds, minutes at most. It was not as though the video were played and several hours later Laskaris made his statement. Taken in full context, it is not difficult to see how the entirety of the discussion took place in the shadow of Towe's misconduct.

Additionally, Counsel for the General Counsel argues that the economic impact of the strike (and attendant leafletting) was not fully expressed when Laskaris informed employees that if the dealership ran out of work, layoffs would occur. Such a reading of the law excuses employees from being aware of their work surroundings and displaying any modicum of common sense. One can be certain that employees were fully aware that work was very slow. They do not need this explained to them with graph, financials and a full hour show featuring Jim Cramer. Employees were painfully aware of the business downturn. The fact that such business circumstance was directly correlated to their labor action does not save the fact that a business cannot survive without customers. It is simply not unlawful to tell employees without work they will not have jobs.

III. BISBIKIS

The arguments in support of Respondent's exception regarding the discharge of Bisbikis are laid out in the Brief in Support of Exceptions. The only issue worthy of reply is the jejune

notion that Bisbikis's actions do not meet some "code of conduct." Whether or not there is a particular code which states: "In the event you scream at management in a foreign language, and this screaming includes physical intimidation and insulting curse words then you will be subject to termination." The fact is **conduct** is precisely why Bisbikis was terminated.

The notion that there is legal precedent to protect this type of conduct is horrifying. The utter lack of civility protected by a statute designed to protect industrial peace is puzzling and inappropriate.

IV. CONCLUSION

For the reasons stated in its original Exceptions and Brief in Support and contained herein, Respondent respectfully submits that its Exceptions be granted and the Complaint dismissed. Alternatively, Respondent requests that the *Wal Mart* doctrine be given proper application and this case re-opened for a proper inquiry on witness credibility

Dated: September 28, 2018

Respectfully submitted:

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REGION 13

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AUTOMOBILE MECHANICS LOCAL 701, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

CERTIFICATE OF SERVICE

Pursuant to NLRB Rules and Regulations 102.113 and 102.114, I certify that before 5:00 p.m. on **September 28, 2018**, I served a portable document format (pdf) copy of Respondent's Reply Brief to Counsel for the General Counsel's Answering Brief to Exceptions, upon Christina Hill, National Labor Relations Board Region 13, through the NLRB's electronic filing system.

On this same date, I certify that I served a copy of Respondent's Reply Brief to Counsel for the General Counsel's Answering Brief to Exceptions upon the following by email:

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Dated: September 28, 2018

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